Order

Entered: June 4, 2002

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

2001-07

Amendment of Rules 7.202, 7.203 and 7.209 of the Michigan Court Rules

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On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 7.202, 7.203, and 7.209 of the Michigan Court Rules are adopted, to be effective September 1, 2002.

[The present language is amended as indicated below.]

Rule 7.202 Definitions

For purposes of this subchapter:

(1)- (6) [Unchanged.]

(7) "final judgment" or "final order" means:

(a) In a civil case,

(i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order, ~~or~~

(ii) an order designated as final under MCR 2.604(B),

(iii) in a domestic relations action, a postjudgment order affecting the custody of a minor,

(iv) a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule,

(v) An order denying governmental immunity to a governmental party, including a governmental agency, official, or employee;

(b) [Unchanged.]

Rule 7.203 Jurisdiction of the Court of Appeals

(A) Appeal of Right. The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) A final judgment or final order of the circuit court~~,~~ or the court of claims, ~~and recorder's court,~~ as defined in MCR 7.202(7), except a judgment or order of the circuit court ~~or recorder's court~~

(a) on appeal from any other court or tribunal;

(b) in a criminal case in which the conviction is based on a plea of guilty or nolo contendere;

An appeal from an order described in MCR 7.202(7)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right.

(2) A judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule~~;~~.

~~(3) In a domestic relations action, a postjudgment order affecting the custody of a minor.~~

~~(4) An order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule.~~

(B) - (F) [Unchanged.]

Rule 7.209 Bond; Stay of Proceedings

(A)-(D) [Unchanged.]

(E) Stay of Proceedings by Trial Court.

(1)-(3) [Unchanged.]

(4) If a government party files a claim of appeal from an order described in MCR 7.202(7)(a)(v), the trial court shall stay proceedings regarding that party during the pendency of the appeal, unless the Court of Appeals directs otherwise.

(F)-(I) [Unchanged.]

Cavanagh, J., states:

I dissent from the adoption of this amendment as there are no compelling reasons to do so and, unlike most other jurisdictions, we currently allow leave to appeal from all interlocutory orders. In its zeal to further protect government defendants and their insurers, this Court divined this amendment on its own hook. Upon publication of this proposal, comments urging its adoption were received-surprise, surprise-from our Attorney General and from the Michigan Insurance Federation. A comment from the Appellate Practice Section Council of the State Bar of Michigan recommended against its adoption, "because it will substantially and unnecessarily increase the number of appeals filed in cases involving governmental parties." Because of the availability of an application for leave to appeal, council members felt the proposal unnecessary and concluded:

> The adoption of the proposed amendment to MCR 7.203 would reintroduce wasteful, piecemeal appeals in a large category of cases. We do not believe it would improve the administration of appellate justice in this state.

For these same reasons, I dissent from the adoption of this amendment.

Kelly, J., joins in the statement of Cavanagh, J.

Weaver, J. (dissenting). I dissent from the adoption of this amendment because it is unnecessary. Unlike many states that have taken a similar approach, Michigan already permits the filing of an application for leave from an interlocutory order. See MCR 7.203(B).

Moreover, the amendment is one-sided, granting only a governmental party an appeal as of right from an adverse decision denying governmental immunity. It does not grant an appeal as of right to a non-governmental party desiring to challenge an adverse decision finding that suit is barred by governmental immunity.[1]

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[1] A non-governmental party may be able to pursue an appeal as of right from an adverse decision that the suit was barred by governmental immunity, if such finding was part of a final order disposing of the entire case. See MCR 7.203(A)(1). However, where other claims and/or other parties are involved, the non-governmental party may be unable to pursue

such an appeal of right. MCR 7.203(A)(1) only grants an aggrieved party an appeal of right from a final judgment or order. Unless the judgment or order disposes of all the claims and adjudicates the rights and liabilities of all the parties, it is not a final order. See MCR 7.202(7)(a)(i).

Taylor, J. (concurring with rule changes):

It is lamentable that dissenting Justices Cavanagh and Kelly, rather than focusing on the merits of MCR 7.203, castigate it because of those who ventured opinions as to the worth of such a rule. Implicit within their dissent is a scornful predisposition toward government officials with views on this as well as those who day in and day out handle cases of this sort. This is unfortunate as would be the stark categorization of any definable group. It is likely they would understand this point better if a similar hostility were shown to a proposal merely because it was backed by the trade unions, the Michigan Trial Lawyers Association or the Irish American Lawyers.

In any event, I believe it is preferable to encourage the perspectives of all who are willing to consider a rule because it is consistent with representative government theories and also assists us in our rule-making capacity. In short, none should be made to feel unwelcome. Accordingly, to all the organizations, letter writers, government officials, editorial page commentators and presenters before this Court, I tender my appreciation for the benefit of their insight.

Justice Weaver's dissent is based on her view that the amendments are "one-sided" in providing for an expedited appeal of immunity issues. However, as acknowledged in her own footnote, in the vast majority of covered cases, the plaintiff sues the government in tort only. That is, they do not couple that claim with a non-tort claim. In such cases, upon dismissal, the party suing the government will have an appeal of right from a final order. In these cases, there is no "one-sidedness" because the government and the plaintiff have the same claim of appeal. In those rare cases in which a party suing the government would not have an immediate appeal by right, because there are additional claims pending, I note simply that the fundamental premise of governmental immunity is that the government *is* different. Unlike other litigants, the government cannot be sued, unless, by legislation, it has affirmatively allowed a particular type of suit to proceed. This immunity is an ancient concept in our law, but it is of considerably diminished value when the government, i.e. the taxpayer, must incur the costs of extended litigation before being able to invoke the principle of immunity. By her reference to "one-sidedness," Justice Weaver evidences a misapprehension of the premises of governmental immunity itself.

The instant amendments also address the immunity of *individual* governmental employees from lawsuit, again subject to certain statutory exceptions. By far, the greatest beneficiary of such individual immunity are law enforcement officers sued for allegedly negligent conduct in carrying out their professional duties. At least in part, we suspect, this reality explains the support for these amendments by the Attorney General.

Before this exchange as to the wisdom of this rule is closed, it is well stand back and consider its justification. The rule is designed to allow an appeal of right regarding the legal question of whether the law of governmental immunity bars a suit, even if the facts of the case are as a plaintiff asserts them. It does this by letting the trial judge's decision on the law concerning immunity be appealed without the need for the litigants to have to go through the rigors of a trial on the facts before the legal issue is determined at the Court of Appeals.

Finally, the Court was advised that the instant approach to governmental immunity has protected the taxpayers interests in other states, and accordingly I am convinced that it gives promise of doing the same in Michigan. Indeed, in providing for the expedited consideration of legal issues of immunity, I believe that these amendments will also result in reduced legal expenses for those who sue the taxpayer.

Staff Comment: The June 4, 2002, amendments of MCR 7.202, 7.203, and 7.209, effective September 1, 2002, involve orders appealable by right to the Court of Appeals.

The provisions concerning custody orders in domestic relations cases and orders regarding attorney fees and costs are moved from MCR 7.203(A)(3) and (4) to MCR 7.202(7)(a)(iii) and (iv). There is also a change in the language regarding fees and costs, to refer to "postjudgment" orders.

New MCR 7.202(7)(a)(v) includes as "final" an order denying immunity to a governmental defendant, as is provided in many jurisdictions. See, *e.g.*, *Mitchell* v *Forsyth*, 472 US 511; 105 S Ct 2806; 86 L Ed 2d 411 (1985).

Language is added to MCR 7.203(A) to make clear that an appeal from an order described in MCR 7.202(7)(a)(iii)-(v) is limited to the portion of the order regarding which there is an appeal of right. In addition, obsolete references to the recorder's court are deleted from that subrule.

New MCR 7.209(E)(4) provides for a stay with respect to a governmental party who takes an appeal of right from an order denying immunity.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.